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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 852

MAUDE H. LAMAR, Personally and As Executrix of the Estate of FREDERICK C. LAMAR, Deceased,
Petitioner,

vs.

EDWIN O. BOOKWALTER, District Director of Internal Revenue,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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No. .....

MAUDE H. LAMAR, Personally and As Executrix of the Estate of FREDERICK C. LAMAR, Deceased,
Petitioner,

vs.

EDWIN O. BOOKWALTER, District Director of Internal Revenue,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Maude H. Lamar, Personally and as Executrix of the Estate of Frederick C. Lamar, by her Counsel prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, reversing the judgment of the United States District Court for the Western District of Missouri.

OPINIONS BELOW

The Memorandum Opinion, Finding of Fact and Conclusions of Law of the District Court, reported at 213 F. Supp. 860, may be found in the appendix, page A8.

The Opinion of the Court of Appeals reported at 323 F.2d 664, is in the appendix, page A23.

JURISDICTION

The jurisdiction of this Court is invoked on the grounds that the Court of Appeals for the Eighth Circuit, erroneously and illegally reversed the judgment of the United States District Court for the Western District of Missouri for the following reasons:

a) The judgment of the Court of Appeals is in conflict with the applicable law of Missouri and judicial interpretation thereof by the Supreme Court of Missouri respecting and defining rights to property in the State subject to Federal Estate Tax. The judgment is in conflict with a judgment of the Court of Appeals for the Tenth Circuit. The case involves an important question respecting Section 2056(a); (b)(1)(A)(B) of the 1954 Internal Revenue Code which has not been settled by this Court but should be so settled because of its nationwide importance, both to the Government and taxpayers, concerning the imposition of Federal Estate Taxes. The Court of Appeals has departed, as will hereinafter be shown, so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The judgment of the Court of Appeals for the Eighth Circuit reversing the judgment of the District Court was entered October 28, 1963.

The order of the Court of Appeals denying a Petition for Re-Hearing was denied December 9, 1963.

A stay of mandate was entered by the Court of Appeals for the Eighth Circuit until February 14, 1964.

No request has been made by the petitioner for an extension of time within which to file this petition.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (62 Stat. 928, June 25, 1948, Ch. 646).

QUESTIONS PRESENTED FOR REVIEW

1. Whether a Court of Appeals may reverse a judgment of the lower court, which court after exhaustive study and research, supplemented by briefs of the opposing parties, entered judgment interpreting State statutory law and judicial interpretation thereof by the State Supreme Court of Missouri, respecting property rights in the State, where there is no showing by the Court of Appeals the District Court misinterpreted or misapplied the law of Missouri.

2. Whether the Court of Appeals correctly interpreted the statutory and case law of the State of Missouri respecting an absolute testamentary grant to a surviving spouse.

3. Whether the Court of Appeals erroneously and illegally, followed as precedent a decision of the Court of Appeals for the Tenth Circuit interpreting Oklahoma law as compared with Missouri law.

4. Whether a Court of Appeals may deny an estate the benefit of the so-called marital deduction for estate tax purposes, under Section 2056(a) of the 1954 Internal Revenue Code, where under State statutory law and Mis-

souri interpretation thereof an absolute bequest was conveyed, not subject to a terminable interest as defined in Section 2056(b)(1)(A)(B) of the Internal Revenue Code.

5. May a Court of Appeals reverse a District Court judgment in a case wherein the District Court meticulously followed a previous decision of the Court of Appeals, which Court of Appeals did not, in any way, modify, change, distinguish or reverse such previous decision.

6. Whether in this case the right of ownership of such right to property, which is subject to a tax by the Federal Government, State law is determinative of such property right subject to such Federal Tax.

b) The Court of Appeals for the Eighth Circuit has erroneously and illegally reversed the judgment of the United States District Court for the Western District of Missouri holding that a testamentary grant of property to a surviving spouse was absolute where the grant in the will was expressed in the following language:

> "I give, devise and bequeath all of the rest, residue and remainder of my property, of whatsoever character and description, real, personal or mixed, wheresoever situate and whether acquired before or after the execution of this WILL, to my wife, Maude H. Lamar, to have and to hold as her property absolutely."

7. Where a testator bequeaths to his surviving spouse, as here, "all the rest, residue and remainder of my property and estate, of whatsoever character and description, real, personal or mixed, * * * to my wife, Maude H. Lamar, to have and to hold as her property absolutely," and in a subsequent paragraph the will provided, "In the event, however, that my wife, Maude H. Lamar, shall die prior to my death, and shall not survive me or in the event she

shall die simultaneously with myself or as a result of a common accident or calamity to both of us, *or shall not survive the administration of my estate*" * * * followed by a grant over, does a bequest in foregoing terms create a terminable interest for Federal Estate Tax purposes under Section 2056(b)(1)(A)(B) of the 1954 Internal Revenue Code?

8. Whether, as the Government claims, and the Court of Appeals, in reversing the District Court held, the bequest of the testator Frederick C. Lamar of the residue of his estate to his surviving spouse, "to have and to hold as her property absolutely" is a terminable interest as defined in Section 2056(b)(1)(A)(B) of the Internal Revenue Code, where such absolute bequest was qualified in a subsequent paragraph of the will by a clause of infinitely less positive force and wholly and completely inconsistent and in conflict with the previous absolute grant.

OKLAHOMA STATUTES[1]

A conditional disposition is one which depends upon the occurrence of some uncertain event, by which it is either to take effect or to be defeated. R.L. 1910, ¶ 8409; 84 Oklahoma Statutes 179.

A condition precedent in a will is one which is required to be fulfilled before a particular disposition takes effect. R.L. 1910, ¶ 8409; 84 Oklahoma Statutes 180.

Where a testamentary disposition is made upon a condition precedent, nothing vests until the condition is

1. Applicable provisions of the 1954 Internal Revenue Code, Treasury Department Regulations and Missouri Revised Statutes are in the Appendix.

fulfilled except where such fulfillment is impossible. . . . R.L. 1910, ¶ 8411; 84 Oklahoma Statutes, 181.

SOUTH DAKOTA STATUTES

WHEN ALL PROPERTY PASSES.

A devise or bequest of all the testator's real or personal property, in express terms, or in any other terms denoting his intent to dispose of all his real or personal property, which he was entitled to dispose of by will at the time of his death. ¶ 657, Revised Code 1919; Chapter 56.0315.

The Oklahoma and South Dakota Statutes, *supra*, are included herein, as will be hereinafter demonstrated, for the reason that the Court of Appeals below in *Lamar*, 323 F.2d 664, l.c. 667, albeit admitting "we are admonished to follow the applicable Missouri statutes as interpreted by the Supreme Court of Missouri and is embodied in the jurisprudence of that State" citing *Kasper* v. *Kellar*, (C.A. 8th 1954) 217 F.2d 744, involving South Dakota law on appeal from a judgment of the District Court in that State of the 8th Circuit, nevertheless leaned heavily on dictum in *United States* v. *Mappes*, (C.A. 10th, 1963) 318 F.2d 508, 510-511. Thus an analysis, comparison, interpretation and validity of the Court's reasoning in this respect requires an examination of the Oklahoma and South Dakota law as compared with that of Missouri, as misapplied and misinterpreted by the Court of Appeals herein.

STATEMENT OF THE CASE

Frederick C. Lamar, husband of the petitioner herein, died testate January 1, 1958, a resident of Kansas City, Jackson County, Missouri. The Probate Court of Jack-

son County, Missouri, admitted the Last Will and Testament of the aforesaid decedent January 8, 1958. (R. 19) His surviving spouse, Maude H. Lamar, was duly appointed Executrix of his estate by the Probate Court of Jackson County, Missouri, at Kansas City, January 9, 1958. Final settlement was approved and the Finding and Decree of Distribution were entered by the Probate Court of Jackson County, Missouri, on February 13, 1959. (R. 32)

The Federal Estate Tax Return (Form 706) of Frederick C. Lamar, deceased, was duly executed and filed November 26, 1958, by the petitioner in her capacity as Executrix of the Estate of Frederick C. Lamar, with the respondent herein, Edwin O. Bookwalter, District Director of Internal Revenue, Kansas City, Missouri. The value of the gross estate was correctly shown therein as aggregating $622,773.[2] The value of the adjusted gross estate for Federal Estate Tax purposes was correctly shown on the Federal Estate Tax Return to be $601,523. With the exception of a residence jointly owned by the decedent and his surviving spouse, the estate consisted of personalty, substantially all of which consisted of stocks, bonds and life insurance policies in which the surviving spouse, Maude H. Lamar, was beneficiary.

The marital deduction on the Federal Estate Tax Return (Form 706) of the decedent Frederick C. Lamar was correctly shown as being $300,761, and was claimed in full, under the provisions of Section 2056(a) of the 1954 Internal Revenue Code, as amended. The respondent herein Edwin O. Bookwalter, District Director of Internal Revenue at Kansas City, Missouri, disallowed the amount of $223,908 of the total marital deduction claimed by the Executrix, his surviving spouse, said respondent asserting

2. Amounts herein are rounded to the nearest dollar amount.

that the disallowance of the aforesaid portion of the claimed marital deduction was based upon the erroneous allegation, that the petitioner herein received only a bequest, subject to a terminable interest under the provisions of Section 2056(b) of the 1954 Internal Revenue Code attributable to the clause "shall not survive the administration of my estate" contained in paragraph two (2) of Article Ten (10) of the Last Will and Testament of Frederick C. Lamar, deceased.

The first two (2) paragraphs of Article Ten (10) in the Last Will and Testament of Frederick C. Lamar, deceased, are as follows:

"ARTICLE TEN

"I give, devise and bequeath all of the rest, residue and remainder of my property and estate, of whatsoever character and description real, personal or mixed, wheresoever situate and whether acquired before or after the execution of this WILL, to my wife, Maude H. Lamar, to have and to hold as her property absolutely.

"In the event, however, that my wife, Maude H. Lamar, shall die prior to my death and shall not survive me or in the event she shall die simultaneously with myself or as the result of the same common accident or calamity to both of us, *or shall not survive the administration of my estate*, then and in that event, I give, devise and bequeath and dispose of said residue and remainder of my property to the following persons and in the manner as follows:"

then followed a bequest over of the "rest and remainder" to the decedent's daughter-in-law, son and two grandchildren. (Emphasis supplied)

On September 2, 1960, the respondent herein erroneously and illegally made a deficiency assessment

against the petitioner, Maude H. Lamar, in her capacity as Executrix of the estate of her deceased husband, consisting of an alleged deficiency in estate tax, plus interest, as follows:

Deficiency	$64,859
Interest	5,598
Total	$70,457

On September 19, 1960, the petitioner paid to the respondent the illegal, erroneous and unlawful estate tax deficiency and interest aggregating $70,457. On the same date the petitioner herein filed with the respondent, the District Director of Internal Revenue, a claim for refund in the amount of $70,457.

On November 22, 1960, the respondent, Edwin O. Bookwalter, disallowed the claim for refund of the petitioner, Maude H. Lamar, in her capacity as Executrix of her deceased husband's estate.

Included in the adjustments made by the respondent respecting the Federal Estate Tax Return (Form 706) of the decedent, Frederick C. Lamar, filed by his surviving spouse as Executrix of his estate was an increase of $2,704 in the value of stocks and bonds reported in the return. The adjustment was conceded by Maude H. Lamar as Executrix, so that there remains in Count I of the complaint of the petitioner and the respondent's answer thereto only the issue relating to the validity of the deduction of the so-called marital deduction under Section 2056(a) of the 1954 Internal Revenue Code. (R. 1-8)

However, the United States of America filed a Motion to Intervene, in the District Court on the basis that subsequent to the filing in the District Court of the complaint and answer by the petitioner and respondent, re-

spectively, but prior to a hearing, the Commissioner of Internal Revenue duly assessed an additional Estate tax deficiency in the amount of $1,350, plus interest, against the estate of Frederick C. Lamar, deceased. Leave to file as Intervenor under Section 7422(e) of the 1954 Internal Revenue Code was granted the United States, which filed its Complaint in Intervention, August 25, 1961.

Maude H. Lamar, personally and as Executrix of the Estate of Frederick C. Lamar, deceased, on September 5, 1961, filed her answer to the complaint of the United States, Intervenor. The issue involved in the Complaint in Intervention and Answer thereto by the petitioner, individually and as Executrix, relates to an increase in State of Missouri death tax credit. The validity of the deficiency asserted by the United States, as Intervenor, is contingent and dependent upon the final determination in respect of the tax which is the subject matter (*i. e.* the validity of the deduction for the so-called marital deduction) of the complaint of the petitioner in the District Court. (R. 8-12)

The case was submitted to the District Court after a regular pre-trial hearing on responses of respondent to petitioner's Request for Admissions under Rule 36, facts admitted and conceded as true and documents admitted in evidence, marked as exhibits binding on the parties, and the United States, with leave of Court, having filed its Complaint in Intervention, the Court entered its order February 12, 1962, concluding that

A) The sole question remaining herein is one of law and not of fact and trial by jury is unnecessary. (R. 13-19)

The United States District Court for the Western District of Missouri entered judgment for the petitioner-plaintiff, Maude H. Lamar, personally and as Executrix

of the Estate of Frederick C. Lamar, against the respondent-defendant, Edwin O. Bookwalter, District Director of Internal Revenue, on December 14, 1962, in the principal sum of $70,149 plus interest thereon at 6% from September 19, 1960; the complaint of the intervenor, the United States of America, was dismissed with prejudice; and the plaintiff was allowed as an estate tax deduction reasonable attorney's fees. Appendix, p. A6.

BASIS OF JURISDICTION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

28 U.S.C. 1346 (Derived from the Act of March 3, 1911, C. 231, 36 Stat. 1093, as amended) provides:

(a) The District Courts shall have original jurisdiction, concurrent with the Court of Claims, of:

1) Any civil action against the United States for the recovery of any Internal Revenue Tax alleged to have been erroneously or illegally assessed or collected without authority, or any sum alleged to have been excessive or in any manner wrongfully collected under the Internal Revenue laws.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. The judgment of the United States Court of Appeals for the Eighth Circuit is in conflict with the applicable, controlling statutory law and judicial interpretation thereof by the Supreme Court of Missouri.

2. The judgment is also in conflict with a judgment of the United States Court of Appeals for the Tenth Circuit,

interpreting Oklahoma law, in that, the Court of Appeals for that Circuit correctly interpreted Oklahoma law respecting the issue presented, whereas the Court of Appeals for the Eighth Circuit erroneously followed the opinion of the Tenth Circuit, thus disregarding the inherent difference and distinction of the laws of the two states, on the precise point.

3. The Court of Appeals for the Eighth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

1. The judgment of the United States Court of Appeals for the Eighth Circuit is in conflict with the applicable, controlling statutory law and judicial interpretation thereof of the Supreme Court of Missouri.

INTRODUCTORY

The Court of Appeals below, after stating the question involved, 323 F.2d 664, 666, quoted verbatim the first two paragraphs of the will antecedent to comment thereon as follows:

> "The controversy is focused upon and revolves around Article Ten of the will, particularly the first two paragraphs of Article Ten, which read:
>
> 'I give, devise and bequeath all of the rest, residue and remainder of my property and estate of whatsoever character and description, real, personal or mixed, wheresoever situate and whether acquired before or after the execution of this WILL, to my wife, Maude H. Lamar, to have and to hold as her property absolutely.
>
> 'In the event, however, that my wife, Maude H. Lamar, shall die prior to my death and shall

> not survive me or in the event she shall die simultaneously with myself or as the result of the same common accident or calamity to both of us, *or shall not survive the administration of my estate,* then and in that event, I give, devise and bequeath and dispose of said residue and remainder of my property to the following persons and in the manner as follows:'. (Emphasis supplied)" (l.c. 666)

The Court then observes that the testator in the nine succeeding paragraphs[3] of Article Ten, the testator, in explicit language provided for the disposition of "the rest, residue and remainder"[4] l.c. 666. (Emphasis supplied)

Apparently the Court was of the view that, as the Government argued, the quantity or number of paragraphs devoted to the attempted bequest over, was superior and controlling, as compared with the quality of the definite, absolute grant to the surviving spouse in paragraph one of Article Ten of the Will.

The Court of Appeals correctly held, we believe, that the crux of the controversy centers upon the nature, extent and character of the interest under Missouri law which passed to decedent's widow under his will at the precise moment of his death, but cited cases respecting the foregoing not in accord therewith but containing dicta questionably relevant.

Among the cases cited are *United States* v. *Quivey,* (C.A. 8th, 1961) 292 F.2d 252, 255; *United States* v. *Mappes,* (C.A. 10th, 1963) 318 F.2d 508, 510-511; *Cunha's Estate* v. *C.I.R.,* (C.A. 9th) 279 F.2d 292, 297, Cert. den. 364 U.S. 942 (1961).

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3. Eight of the preceding paragraphs had to do with specific bequest amounting to a total of $26,000.

4. Actually the alleged bequest over in the will was "residue and remainder", not "rest, residue and remainder."

In *Quivey, supra*, the United States District Court for the District was reversed, respecting a widow's allowance under Nebraska statutes.

In *Mappes, supra*, the United States Court of Appeals for the Tenth Circuit reversed the District Court for the Western District of Oklahoma, in a valid application of the statutory provisions of Oklahoma, which differ materially with those of Missouri as will be hereinafter shown.

In *Cunha, supra*, in which this Court denied a Petition for a Writ of Certiorari, the United States Court of Appeals for the 9th Circuit, held that under California law the right to a widow's allowance is a terminable interest, and upon termination thereof, the estate assets passed to a son for less than adequate consideration, thus precluding a marital deduction for the full amount of the widow's allowance. It is apparent the above cases are of no assistance in determining the issue here.

By contrast, the full amount of the widow's allowance qualified under Missouri law for the marital deduction in the following cases:

1. *In re Estate of Prince Albert Gardner, Jr., Deceased, Leah L. Gardner, Administratrix, v. United States of America*, (1963, D.C. Mo.) 220 F. Supp. 196 (both the Government and taxpayer have appealed) wherein it was held that under the Missouri law, the spouse's allowance is vested immediately on death and is not terminable on the happening of any contingency.

2. *Avery*, T.C. 40, ... (1963). (Docket No. 91943).

In *Avery*, the Tax Court of the United States held that a widow's allowance of $12,000, paid in a lump sum was, under Missouri law, not a terminable interest, and consequently qualified for the marital deduction.

Among cases cited by the Respondent (the Commissioner of Internal Revenue) in support of his position that the allowance was a terminable interest were *Quivey* and *Cunha's Estate, supra,* also cited by the Court of Appeals in *Lamar,* l.c. 667, respecting the "extent and character of the interest under Missouri law which passed to decedent's widow under his will at the precise moment of his death." Concerning the above cases, the Tax Court of the United States, in *Avery,* observed that the above cases (cited by the Commissioner of Internal Revenue in *Avery* and by the Eighth Circuit in *Lamar*) were distinguishable, in that they involved laws of other states.

The foregoing indicates the erroneous application of the laws of other states, disregarding the Supreme Court of Missouri, relied upon by the Eighth Circuit to interpret Missouri law as it applies to the *Lamar* will.

3. *E. O. Bookwalter, District Director of Internal Revenue, Appellant,* v. *Marie Phelps, Executrix, Estate of Calvin N. Phelps, Deceased* (1963, December 11—C.A. 8th, No. 17,339). Opinion in Appendix, page A37. In *Phelps,* the government contended that a widow's allowance under Missouri law was conditioned upon her being alive at the time it was payable; otherwise, it constituted a terminable interest under Section 2056(b)(1) of the 1954 Internal Revenue Code, and therefore did not qualify as a marital deduction. The District Court rejected this contention and held that under Missouri law, the widow's allowance was her absolute property and was not subject to a terminable interest. *Phelps* v. *Bookwalter,* (1962, W.D., D.C. Mo.) 210 F. Supp. 801.

The Court then proceeded to analyze Missouri law, which we respectfully submit was misinterpreted and misapplied by the Court of Appeals for the Eighth Circuit Court of Appeals for the following reasons.

Under the law of Missouri, statutory and judicial interpretation by the Supreme Court of Missouri, the Testamentary grant by the decedent to his surviving spouse, Maude H. Lamar, was absolute and indefeasible at the moment of his death. Accordingly the grant was not subject to a terminal interest as defined in the 1954 Internal Revenue Code, Section 2056(b)(1)(A)(B).

Missouri law provides that when a person dies, his real and personal property passes to whom it is devised. Missouri Revised Statutes, Chapter 473.260 (L. 1935, p. 385, § 105). Appendix p. A5. Where property is devised or bequeathed in Missouri in such terms as "to have and to hold as her property absolutely," as the testator did here in the first paragraph of Article Ten of his Will, such a grant prevailed over a subsequent, inferior, attempted limitation, which was in conflict and inconsistent with the prior absolute grant and consequently of no effect and completely inoperative to limit the absolute grant. If there be doubt about the legacy it will be construed as vested rather than contingent. *Uphaus* v. *Uphaus*, (Mo. Sup.) 315 S.W.2d 801 (1958).

The law favors vested grants and holds that the rule is that testamentary estates shall vest at the earliest possible date, unless the contrary intention is *clearly manifested* in the grant. *Trautz* v. *Lemp*, 144 Mo. 258, 46 S.W.2d 135, 139 (1932). (Emphasis supplied). In that case the testator created a trust with three sons as beneficiaries, but provided "this trust is to commence immediately upon the termination of the administration of my estate", which provision, as applied to Lamar could have read "this grant (to Mrs. Lamar) of all the 'rest, residue and remainder of my estate' shall take effect immediately upon the termination of my estate". But such a condition, similar to that in *Trautz* would be wholly

ineffective, inasmuch as Mrs. Lamar took an absolute, indefeasible property right, at the moment of her husband's death. As the Supreme Court of Missouri in *Trautz, supra*, stated:

> "The testator knew such to be the fact because he is presumed to know the law." l.c. 40 S.W.2d 139.

Permeating and pervading the body of judicial writings treating with vested and contingent interests is the basic principle that Missouri law favors the vesting of testamentary gifts or legacies at the earliest possible date, unless a contrary intention is clearly manifested. *McDougal v. McDougal* (Mo. Sup.) 279 S.W.2d 731 (1955) and cases therein cited. This rule has been followed by the United States Court of Appeals for the Eighth Circuit.

> "It is true the law favors the vesting of estates, and, in the absence of words expressing a clear intention to the contrary, the estate will be construed as vested rather than contingent and, if consistent with the intention of the grantor, will be construed to vest at the earliest possible time," and further "a construction will be adopted, if reasonably possible, that the estate had not been subjected to a condition, particularly a condition precedent. The same rule prevails in personalty as an interest in realty." *Blackhurst* v. *Johnson*, 72 F.2d 644, 647 (C.A. 8—1934).

Even though a testator may have believed, after intentionally devising a fee to his daughter, that he could thereafter, in the event she owned the land at her death and was living without issue, devise it to others,

> "it is readily apparent he cannot do so. Having intentionally devised the fee to her, all power directing any further disposition of the property was at an end." *Schake* v. *Siem*, (Mo. Sup.) 265 S.W.2d 338, 341 (1954).

The devising of a fee in one paragraph of a will in terms describing an absolute estate cannot be annulled except by later language in the will which expressly or by necessary implication, arising from words equally as clear as those in granting the fee, limits the grant. *Vaughan* v. *Compton*, 361 Mo. 467, 235 S.W.2d 328 (1950); *Thompson* v. *Smith*, (Mo. Sup.) 300 S.W.2d 404 (1957). Wherever it is possible an instrument will be construed as not creating an estate subject to a condition, particularly, a condition precedent. The law favors the vesting of estates, and in the absence of words expressly showing a clear intent to the contrary, an estate will be construed vested rather than contingent and consistently with the testator's intention, the estate will be vested at the earliest possible time, so that; unless otherwise clearly expressed, it will vest immediately upon the testator's death. *Deacon* v. *St. Louis Trust Co.*, 271 Mo. 669, 197 S.W. 261, 265. (1917).

Ordinarily, the intention of the testator must be determined from the will itself.

> "The intent of the testator taken from the four corners of the will is the 'pole star' to be followed in construing a will." *Gehring* v. *Henry*, (Mo. Sup.) 332 S.W.2d 873, 877 (1960), citing *Baxley* v. *Ester*, 319 S.W.2d 628, 632.

Applying the doctrine expressed in *Gehring*, *supra*, Article Twelve of the will throws considerable light on the intention of the testator, indicating a complete lack of intention of the testator to create a conditional grant. In Article Twelve, the decedent appointed his wife executrix, in which capacity she served. The normal conditions, usually found in wills appeared, namely whether she be deceased, resign, be disqualified or unwilling to act (R. 23), but significantly nothing was said in the final paragraph of the will respecting her surviving the administration of the estate.

In Missouri a devise of land "absolutely" is sufficient to create in the surviving spouse a fee simple estate notwithstanding a subsequent grant in a subsequent paragraph of the will to the heirs of the deceased testator's sister upon the death of the surviving spouse. Although the widow was granted, in the second paragraph, a power to sell the property, the Court held absent such power to sell, the grant "absolutely" in the first paragraph of the will was sufficient to give to the devisee therein named, title in fee simple to the lands described. "By that clause, testator devised said land 'absolutely'. This, without more, suffices to carry the title in fee simple. * * * The title given in the first clause is absolute, unless cut down by the testator in the subsequent clauses, through the use of words of equal clearness showing his intention so to do." *Bowles et al.* v. *Schocklee*, (Mo. Sup.) 276 S.W. 17, 18 (1925).

The reported cases in Missouri uniformly hold that a testamentary grant of property "absolutely" with nothing more creates a fee simple estate in the grantee and cannot be annulled except by language in the will which expressly or by necessary implication arising from words equally clear and conclusive as those granting the fee, cuts down the previous grant of the fee. A typical illustration of this rule may be found in *Middleton* v. *Dudding*, (Mo. Sup.) 183 S.W. 443 (1916), wherein the will provided:

> "First I will and bequeath to my wife Annie * * * as her absolute property all my real estate and personal property."

Thereafter, a codicil was added providing for grants over to others in the event his wife died intestate. It was held the grant to the wife conveyed an indefeasible fee simple estate. The Court observed that "he (the testator)

attempted to make a double devise of the fee. *It is too clear for elaboration that this can never be done.*" l.c. 445 (Emphasis supplied). The decision of the Eighth Circuit in the Lamar case accomplishes a result which the Supreme Court of Missouri says in *Middleton, supra*, "can never be done." Such is the controlling principle of law in this state.

A will provided that all the real and personal property owned and possessed by him (the testator) at the time of his death should pass unconditionally to his surviving spouse. The devise created a fee simple estate in the wif notwithstanding the second paragraph of the will which provided that upon her death all of her real and personal property shall pass "unconditionally to" others. The Court determined that a fee simple estate granted by devise or bequest may not be cut down or limited by a subsequent ambiguous provision. *Gehring* v. *Henry, supra.*

In a case wherein the dispositive language is somewhat similar to that of the Lamar case, the Supreme Court of Missouri declined to accept the Plaintiffs contention that subsequent language in a will was a limitation on a previous absolute grant. *Housman* v. *Lewellen*, 362 Mo. 759, 244 S.W.2d 21 (1952). The Court held as a cardinal principle of Missouri law that "any conclusion as to what the testator has in mind must be based upon the *legal effect* of the language used in the will itself." (l.c. 23) (Emphasis supplied).

In *Housman, supra*, the dispositive portions of the will material here, are:

> "Second, I give, devise and bequeath to my beloved wife, Molly A. Tolle, all my property of every kind and description, wherever located to be her absolute property." (Note the similarity here to the

bequest in paragraph one of Article Ten in the Lamar Will).

In the third paragraph, the decedent appointed his wife executrix to serve without bond:

> "Fourth, I request and direct that my beloved wife, shall by will or otherwise, divide any remainder that may be left of my estate at her death, one-half to her relations and the other one-half to my brothers and sisters, or their descendants."

It was maintained that the foregoing paragraph was a limitation on the second paragraph, *supra*. The Supreme Court of Missouri held otherwise stating:

> "The Testator may have thought that, after giving the property to his widow as her absolute property, he could make a further bequest of the property himself, but his ignorance of law in that respect cannot alter the fact the only way he could make the prior request of the absolute title was by express terms or words of equivalent force, clearness and strength * * *. The attempted disposition over was void and repugnant to the prior bequest to his widow and his sisters took nothing thereunder." (l.c. 25)

After conveying an absolute estate to her husband, a wife endeavored in the next paragraph of her will to convey the remainder to others in this language, "at the death of my husband, Dr. R. F. Cook, if he should survive me, I give all of the property that I may own at my death that may not have been disposed of by my husband during his lifetime as follows:" (there followed grants over to others). The Court held it was legally bound by the language of the testatrix used in the will, stating:

> "We cannot write a new will for her. We can neither ignore its unambiguous words, nor under the guise of interpretation strike from Item 8 of her will

the words 'absolutely and in fee simple'. These words mean just what they say, but having granted to her husband in Item 8 of her will an estate in fee simple absolute, testatrix had nothing left which was left to special limitation, condition subsequent, or executory devise." *Vaughan* v. *Compton*, 361 Mo. 467, 235 S.W.2d 328 (1950).

Examination of reported Missouri cases respecting the *time* of vesting in situations involving dispositive language, leads to the unavoidable conclusion that this state had long favored a vested interpretation resulting in the vesting of testamentary gifts or legacies at the earliest possible date. *McDougal* v. *McDougal, supra; St. Louis Union Trust Co.* v. *Kaltenbush*, 253 Mo. 1114, 186 S.W.2d 578 (1945); *Palmer* v. *French*, 326 Mo. 710, 32 S.W.2d 591 (1930); *Green* v. *Irvin*, 309 Mo. 362, 274 S.W. 684 (1925); *Chew* v. *Keller*, 100 Mo. 362, 13 S.W. 395 (1897).

Adhering to the principle of early vesting in Missouri, Maude H. Lamar, the surviving spouse here, took a fee simple estate at the death of her husband. There have been established by the Courts applicable rules of construction to arrive at the testator's intention. Primary among them is the basic governing principle, as stated herein that the law favors the vesting of testamentary gifts or legacies at the earliest possible date, unless a contrary intention is manifested clearly.

> "Where there is doubt as to the nature of the legacy or interest, it will be construed as vested rather than contingent 'because that usually better conforms to the testator's meaning' * * * and 'testators usually have in mind the actual enjoyment rather than the technical ownership of their property' (citing cases). In fact, it has been stated pointedly that 'the universal rule is * * * that, wherever it is possible, an instrument will be so construed as not creating an estate subject to a condition, particularly, a condition

precedent'." *Deacon* v. *St. Louis Union Trust Co.*, 271 Mo. 669, 197 S.W. 261, 265 (1917).

Where there is doubt whether a remainder is vested or contingent, the Courts will construe it as a vested estate. *Riley* v. *Kirk*, 213 Mo. App. 381, 253 S.W. 50, 52 (1923). By resort to the four corners of the Lamar will, even an incipient doubt vanishes as to the testator's intent. The mere fact that a contingent interpretation may be applied to a given disposition is not sufficient reason to repel the Missouri rule preferring a vested construction. On the contrary, it has been held that in order to overcome this preference, the intent to create a contingent estate must be set forth with particular clarity. *St. Louis Trust Co.* v. *Herf*, 361 Mo. 548, 235 S.W.2d 241 (1951), wherein the Court stated:

> "When the testator's intention is not clearly expressed, the remainders can be held contingent only upon a *very strong* showing that the settler so intended," l.c. 247 (Emphasis supplied).

The first clause of Section 473.260 of the Revised Missouri Statutes has been uniformly and literally interpreted by the Courts of Missouri. "When a person dies" is interpreted to mean exactly what it says, namely "at death", and for that reason testamentary grants are deemed to vest at the earliest possible period unless a contrary intention is clearly manifested, without any doubt whatsoever, concerning the intent of the testator. The law favors such early vesting of estates and one of the recognized rules of construction is that an estate will be held to vest at the earliest possible moment of time, which ordinarily is immediately upon the testator's death, unless a clear and certain intention to the contrary is manifested in the will. *Miller* v. *Kriner*, (Mo. Sup.) 247 S.W.2d 757, 761 (1952).

Since Maude H. Lamar, the first donee after specific bequests, took an absolute estate by the terms of paragraph one of Article Ten of the will "to have and to hold as her absolute property" the situation comes under a long-standing rule of construction which has frequently been applied in the Missouri Courts, namely, "where the words of a will at the outset clearly indicate a disposition by the testator to give the entire estate (after specific bequests) absolutely to the first donee, the estate will not be cut down to a less estate by subsequent or ambiguous words inferential in their intent." *Cornet* v. *Cornet*, 248 Mo. 184, 154 S.W. 121, 133 (1913). And where such an estate is created, as here, it vests immediately in the devisee upon the death of the testator. The time factor is infinitesimal inasmuch as the death of Frederick C. Lamar gave life to the absolute estate in which his wife became vested immediately. The Missouri rule is that the law favors vested estates, so that, unless the testator has by very clear words manifested his intention to the contrary the persons who shall take under his will must be determined at the death of the testator and the estates given them vest *then*. *Taylor* v. *Hughes*, 363 Mo. 389, 251 S.W.2d 94 (1952) (Emphasis supplied). And again in *Bolles* v. *Boatmen's National Bank of St. Louis*, 363 Mo. 949, 255 S.W.2d 725, 730 (1953), the Supreme Court of Missouri stated:

> "The law favors vested estates, and one of the recognized rules of construction is that an estate will be held to vest at the earliest possible amount of time, which ordinarily is *immediately* upon the testator's death, unless a *clear* and *certain intention* to the contrary is manifested in the will." (Emphasis supplied).

The following Missouri cases, among others, also hold that the law favors the vesting of estates, in the absence of clearly and forcibly expressed intent to the contrary, at the earliest possible time, and immediately upon the

testator's death. *Ewart* v. *Dalby*, 219 Mo. 108, 5 S.W.2d 428 (1928); *Plummer et al.* v. *Brown et al.*, 315 Mo. 627, 287 S.W.2d 316 (1926); *Bishop et al.* v. *Broyles et al.*, 324 Mo. 69, 22 S.W.2d 740 (1929), *Sanders* v. *Jones*, 347 Mo. 255, 147 S.W.2d 424 (1941).

It is submitted that it is not the function of the Court of Appeals to interpret a will, where the finding of the District Court is not only permissive, but there is complete lack of misapplication or misinterpretation on the part of the District Court after a thorough analysis of the applicable State law.

The qualifying conditions in paragraph two of Article Ten of the Lamar Will are:

1. The surviving spouse should predecease the husband.

2. That she should not survive him.

3. That she die simultaneously with him in a common accident.

4. *Or shall not survive the administration of my estate.* (Emphasis supplied).

Naturally, if any of the first three conditions occurred, Mrs. Lamar could not possibly take under the will. The fourth condition, however, has not the force and effect of the absolute grant in paragraph one of Article Ten and is in conflict and inconsistent therewith. As the Supreme Court of Missouri has, time and again, held, as demonstrated herein, the testator Frederick C. Lamar could not convey to his surviving spouse all of the rest, residue and remainder of his estate "to have and to hold as her property absolutely," and then restrict such absolute grant by inconsistent and conflicting so called "boiler-plate" verbiage.

As stated heretofore, the testator knew such to be the fact because he is presumed to know the law, *Trautz* v. *Lemp, supra.*

The judgment of the Court of Appeals in Lamar is also in conflict with a judgment of the United States Court of Appeals for the Tenth Circuit, interpreting Oklahoma law, in that the Court of Appeals for that Circuit, correctly interpreted Oklahoma law respecting the issue presented, whereas the Court of Appeals for the Eighth Circuit erroneously followed the opinion of the Tenth Circuit, thus disregarding the patently inherent difference and distinction of the law of the two states, on the precise point.

In *Mappes* v. *United States,* (1962, W.D.D.C. Oklahoma) 208 F. Supp. 42, the dispositive portions of the will did not create an absolute estate such as created in Lamar in the first paragraph of Article Ten of the will. The portion of the Mappes will which the District Court characterized as pertinent are paragraphs II and III thereof. They are as follows:

Paragraph II says, and we quote:

> "I give, devise and bequeath to my wife, Lottie Mappes, if living at the time of my death, all of the remainder of my property, real, personal and mixed, wherever it may be situated."

The only modification of this outright devise, if any, is found in paragraph III, which says:

> "In the event that my wife should predecease me, or should die before my estate has been administered, then in that event I give, devise and bequeath to my sons, Ernest E. Mappes and Vernon G. Mappes, share and share alike, all the remainder of my property, real, personal and mixed, wheresoever situated. If either of said sons should predecease me, then the interest

that would go to said son shall pass to his children, if surviving, otherwise to the surviving son."

It is observed from the foregoing, particularly paragraph II that the grant in Mappes falls far short of the absolute grant in Lamar since it was conditioned upon "if living at the time of my death". In paragraph III of Mappes there are two conditions set forth equally as strong as the dispositive language in paragraph II, namely that if the testator's wife predeceased him (from which it would naturally follow the testator's grant to his surviving spouse must fail) and "should die before my estate has been administered". Then followed a grant over to others.

There is considerable difference apparent in the grant in Mappes and that in Lamar, and although the condition respecting the death of the spouse before the estate has been administered is similar to that in Lamar, it nevertheless is more clear and definite as it fits in the Mappes will as compared with the inconsistent conflict in paragraph II of Article Ten with an absolute grant in Lamar in paragraph I thereof.

The Probate Court in Oklahoma, inasmuch as the wife survived the husband, decreed and ordered that she receive all the property owned by the deceased at his death and set forth no restrictions thereon. The United States District Court in Oklahoma held the grant qualified for the marital deduction because the property passed to the surviving spouse in accordance with the judgment of the Probate Court of Oklahoma County.

The United States Court of Appeals for the Tenth Circuit reversed *United States* v. *Mappes*, (C.A. 10th, 1963) 318 F.2d 508. The Court held that reliance on the conclusive effect of the decree of the Probate Court to be untenable, for the Probate Court did not purport to con-

strue the will to determine the nature and extent of the property interest which passed at the instant of the testator's death—"the crucial time here", l.c. 511.

Compare the District Court's opinion in Mappes with that of Lamar wherein an exhaustive study and analysis of Missouri law was made on the issue involved by a learned jurist, who has been on the Federal bench in the Western District of Missouri for more than twenty years, in which State he practiced law practically all his lifetime, except that time spent on the bench and in the Congress of the United States, where he served on the Committee which brought out the original bill to equalize taxation among common law and community property States. This Bill became Section 812 of the 1939 Code, the precursor of Section 2056 of the 1954 Code.

In reversing the District Court in Oklahoma the Tenth Circuit resorted to Oklahoma statutory provisions of that State. The Court said:

> "The words of the second paragraph (of the Mappes will) are undoubtedly intended to impose a limitation over to the sons: thus effecting a conditional disposition, as one depending upon the occurrence of some uncertain event by which it is either to take effect or be defeated." Citing 84 Oklahoma Statutes 179: l.c. 511.

There is no statutory provision in Missouri comparable to that of Oklahoma, upon which the Tenth Circuit premised its opinion and judgment.

Other provisions of Oklahoma law not to be found either in Missouri Statutory law, or similar application thereof in case law are that a condition precedent in a will is one which is required to be fulfilled before a particular disposition takes effect. 84 Oklahoma Statutes 180. Where a testamentary disposition is made upon a condition pre-

cedent, nothing vests until the condition is fulfilled except where such fulfillment is impossible. 84 Oklahoma Statutes 181.

In Lamar, the Eighth Circuit, while safely clothing its decision in ambiguity by asserting that "while Mappes is not controlling because the Court there was concerned with the construction of a will under Oklahoma law, it is nevertheless *persuasive authority* for the proposition that the interest of Mrs. Lamar in the property devised and bequeathed to her was defeasible and terminable and not subject to qualification for the marital deduction." l.c. 671. (Emphasis supplied).

Accordingly, the Eighth Circuit classifies Mappes as not only authority to hold the grant to Mrs. Lamar in the instant case to be a terminable interest but that it (Mappes) is *persuasive* authority to so decide. Thus, we are met with the determination by the Court of Appeals for the Eighth Circuit of a question inherently controlled by Missouri law, by resorting to statutory law of Oklahoma, foreign and inimical to Missouri jurisprudence in this area of property rights and interests, and absolutely contrary to the prevailing authorities and decisions of the Supreme Court of Missouri.

3. The Court of Appeals for the Eighth Circuit has so departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

This Court has granted certiorari because of conflict of decisions in circuits respecting applicability of the marital deduction relating to the proceeds of insurance policies involving an election of certain settlement options under §812(e)(1) of the 1939 Code. *Edward J. Meyer, et al., Petitioners, v. United States*, 364 U.S. 410, (1960).

We have, however, been unable to find a case wherein this Court resolved a difference among decisions of the Circuit Courts of Appeals respecting 2056(b)(1)(A)(B) of the 1954 Internal Revenue Code, although there exists a wide variance of opinion among District and Courts of Appeals on the precise question herein presented.

In the instant case the decision of the Eighth Circuit ignored and failed to give consideration to this Court's pronouncement in *Blair* v. *Commissioner of Internal Revenue*, 300 U.S. 5, 9 (1937), where it was held that a decision of a state court interpreting law in relation to a trust cannot justly be ignored insofar as it is found that the local law is determinative of any material point in controversy.

This Court's decision in *Riggs* v. *Del Drago et al.*, 317 U.S. 95, 97, 98 (1942), was likewise ignored by the Circuit Court of Appeals for the Eighth Circuit. In that case this Court stated:

> "* * * the applicable state law as to devolution of property should govern the distribution of the remainder and the ultimate impact of the federal tax;" . . . l.c. 98.

It appears that the Eighth Circuit is not only in conflict with *Blair* and *Riggs* v. *Del Drago*, *supra*, but also with *Helvering* v. *Stuart*, 317 U.S. 154, 161.

Further complicating the situation, there now exists in the Eighth Circuit two decisions that are diametrically opposed to each other. In other words, there is a conflict within the Circuit respecting state laws with a coincidental degree of uniformity, namely South Dakota and Missouri.

South Dakota Statutory law provides that all property passes, by devise or bequest, in express terms, or in any other terms denoting the testator's intent to dispose of by

will, *at the time of his death.* ¶ 657, Revised Code 1919, *supra* (Emphasis supplied).

Missouri law provides a decedent's property, real and personal, passes to the persons to whom it is devised, *when a person* (testator) *dies.* Missouri Revised Statutes, Chapter 473.260 (L. 1955, p. 385, § 105), App. P. A5.

Respecting personal property in Missouri an executor has a right to take possession thereof and administer it according to law. Missouri Revised Statutes, 473.263 (L. 1955, p. 385, § 106). However, executors or administrators in Missouri may distribute legacies six months after the issuance of letters testamentary. Missouri Revised Statutes 473.610 (L. 1955, p. 385, § 215).

In the Lamar case, the surviving spouse could have claimed and received her bequest after the expiration of the six month period. The probate estate consisted entirely of personalty in a very substantial amount, and the expenses were minimal.

The foregoing is prelude to a comparison of *Kasper* v. *Kellar,* (C.A. 8th, 1955) 217 F.2d 744; *Kellar* v. *Kasper,* (D.C. S.D., 1956) 138 F. Supp. 738; *Lamar* v. *Bookwalter,* (D.C. Mo., 1962) 213 F. Supp. 860; and *Bookwalter* v. *Lamar,* (C.A. 8th, 1963) 323 F.2d 664, which is the case upon which we seek a writ of certiorari to the Eighth Circuit.

In *Kasper* v. *Kellar, supra,* the pertinent section of the 1939 Internal Revenue Code was 26 U.S.C. 812(e)(1)-(A)(B) from which the applicable sections in the Lamar case, namely, 26 U.S.C. 2056(b)(1)(A)(B) were derived.

In item 2. of his will, Kellar, a practicing lawyer in South Dakota, bequeated to his wife, Flora B. Kellar, "if *living at the time of the distribution* of my estate the sum of One Hundred Thousand Dollars ($100,000) * * * if she

be then dead, this legacy to lapse and become a part of my residuary estate."

In item 5 of the Kellar will it was stated:

> "If living at the time of the distribution of my estate, I give, devise and bequeath to my wife, Floy B. Kellar, one-third . . . of the rest, remainder of my property and estate. . . ."

The widow's share of the residuary estate was devised and bequeathed to other named persons,

> "if . . . my wife . . . dies prior to the distribution of my estate." 217 F.2d, l.c. 746.

The absence of an absolute grant in Kellar is significant, but the grant was allowed as a marital deduction by the District Court, without opinion. The government appealed to the Court of Appeals for the Eighth Circuit and that Court reversed the judgment and remanded the case for a determination of whether under the wills-and-property law of South Dakota the language used and the intention and the circumstances involved would be regarded as having the legal effect of vesting and making indefeasible in the widow, as of the time of the testator's death, the property devised and bequeathed to her.[5]

On remand, the District Court for the Western District of South Dakota held the grant of the decedent to his surviving spouse qualified under South Dakota law. *Kellar* v. *Kasper*, (D.C. S.D., 1956) 138 F. Supp. 738.

Although conditional dispositions are statutory in South Dakota (see *Kellar* v. *Kasper*, *supra*, l.c. 739), nevertheless the District Court of South Dakota, on remand, held

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5. Collett, then Judge on the Court of Appeals, dissented. Prior to his service on the bench, he practiced law in Missouri. He was of the opinion the judgment should be affirmed.

that where a conditional devise is made and that condition is *definite and certain* our courts will recognize such condition expressed in his will and carry it out, l.c. 742. The District Court, accordingly held, on remand, that the language in the Kellar will, wherein there was no absolute grant as in Lamar, was not sufficiently definite and certain to create a defeasible grant to the surviving spouse (Emphasis supplied).

The Court of Appeals for the Eighth Circuit, in *Kasper v. Kellar*, observed the Court was urged (by the appellee-taxpayer) to hold that under South Dakota Law, on the circumstances involved, the term "if living at the time of the distribution of my estate" is entitled to be read as "if living at the time of my death," and should be held *to have that local legal effect* in relation to the passing of a decedent's property. l.c. 747.

The Court of Appeals found there were a number of cases in other states to have reached a conclusion of that nature, namely Kansas, Pennsylvania, Connecticut, Iowa, Arizona, New Jersey and Michigan. l.c. 747.

With all due deference, the Court could have included Missouri, which has steadfastly refused to permit an absolute grant to be cut down, except by language of equal force and effect as that creating the absolute grant, which language is certainly lacking in Lamar.

On the other hand there are a number of jurisdictions which have refused to accord anything except the literal, technical meaning to such expressions as "at the time of the distribution of my estate", or "at the time of settlement of my estate" in relationship to general estate administration.

They are as follows: California, Illinois, New York, Rhode Island and Minnesota. l.c. 747.

The Court of Appeals, in Kasper, expressed the view that on questions of local law (we) "have particularly emphasized as our many decisions indicate, that we desire and will heavily rely upon the considered appraisal of a District Judge as to what the local law of his jurisdiction is". l.c. 747.

The reason for expressing the above view as explained by the Court was that "factors of evaluation and judgment on unsettled questions will naturally be present at the local level which are not available to us". l.c. 747.

In Lamar the District Court meticulously followed the admonition of the Court of Appeals respecting local laws affecting property rights, particularly in the state in which the District Court presides. He examined comparable Federal cases, including the opinion of the District Court of Oklahoma in Mappes and then concluded "none of the above cases are of much help to us here. . . ." l.c. 863.

Then the District Court analyzed and commented on *Smith v. United States*, (D.C. Colo., 1957) 158 F. Supp. 344, which appears to be factually directly in point. The bequest to the surviving spouse in one paragraph was of all the rest, residue and remainder "to be her absolute property". The next paragraph, among other limitations, stated, "In the event . . . my said wife . . . surviving me, before distribution to her of the bequest herein provided for her", then the bequest would lapse and become a part of the remainder estate over to others. The District Court held the grant qualified as a marital deduction. Notwithstanding the District Court's comment on the Smith case and reference to it on brief, by the appellee, the Court of Appeals in its opinion gave it no consideration, or at least failed to consider the case worthy of mention, although the District Court had characterized it thus, "The question for

determination (in Smith) was the same as here", *Lamar v. Bookwalter*, 213 F. Supp. 860, l.c. 863.

The District Court thoroughly reviewed and followed the opinion of the Court of Appeals in *Kasper v. Kellar, supra*, as shown in its opinion, l.c. 864, 865 and then proceeded to "come now to the question of how Missouri Courts construe the language of the Lamar will", l.c. 865, and concluded therefrom, correctly we assert, that the absolute grant of the decedent Frederick C. Lamar to his surviving spouse created in her an indefeasible estate under Missouri law and accordingly qualifies for a marital deduction as held by the District Court for the Western District of Missouri.

It appears therefore, that there exist in the United States Court of Appeals for the Eighth Circuit, two divergent and conflicting rules of law on an identical issue between two states possessing similar statutory and case law. Thus in Missouri an absolute grant is rendered a terminable interest by a subsequent statement "or shall not survive the administration of my estate".

In South Dakota, a grant not so definitely absolute as that in Missouri, but qualified by the following language "if * * * my wife * * * dies prior to the distribution of my estate" is not a terminable interest and qualifies for the marital deduction. Such a situation approaches the chaotic and should be corrected by this Court.

Because of the divergent views and conflicts existing respecting the interpretation of Section 2056(b)(1)(A)(B), of the 1954 Internal Revenue Code; its importance to taxpayers throughout the country in planning devolution of their estates; its importance to the government in collecting the revenue and in particular in this case wherein the Court of Appeals for the Eighth Circuit has obviously and

manifestly misinterpreted and misapplied Missouri law respecting property rights; the failure to carry out the intent of the Congress to equalize taxation among the Community property states and the common law states; because in this instance the same property bequeathed to her, if possessed by Mrs. Lamar upon her death, will again be subject to tax contrary to the intent of the Congress and finally because the question has not been considered by this Court, the decision and judgment of the Court of Appeals for the Eighth Circuit should be reviewed by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit be granted.

Respectfully submitted,

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